No. SC94503

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

DEMETRICK TAYLOR,

Appellant.

Appeal from the City of St. Louis Circuit Court
Twenty-Second Judicial Circuit
The Honorable Jimmie M. Edwards, Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

JENNIFER A. RODEWALD
Assistant Attorney General
Missouri Bar No. 64236

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-1626
Fax: (573) 751-5391
Jennifer.Rodewald@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

Defendant, Demetrick Taylor, was charged with possession of a controlled substance. (L.F. 22-24). Defendant was found to be a prior and persistent offender. (Tr. 265). Defendant does not challenge the sufficiency of the evidence to support his convictions. Viewed in the light most favorable to the verdict, the evidence presented at trial showed:

In the early morning hours of January 25, 2012, St. Louis Metropolitan Police Department Officers Kristopher Clark and Daniel Chamblin were patrolling the Wells-Goodfellow neighborhood in St. Louis. (Tr. 160). At approximately 1:19 a.m., Officers Clark and Chamblin saw a man walking on the sidewalk, looking into parked vehicles. (Tr. 161). The officers believed that he might be looking for valuables in the vehicles. (Tr. 161). Officer Clark stopped the marked patrol vehicle and directed his spotlight on the man; the man then turned toward the police vehicle, and Officers Clark and Chamblin recognized the man as Defendant. (Tr. 161-62, 215). As the officers exited the vehicle, Defendant turned away from them and ran away. (Tr. 163, 217-18).

The officers pursued Defendant and were only a few feet behind him, keeping their flashlights trained on him. (Tr. 165-68, 219, 222). Defendant ran into a vacant lot but stopped running when he encountered a fence that he could not climb over quickly. (Tr. 163-66). As Defendant stopped in front of

the fence, he reached his hand into the front of his waistband, grabbed a clear plastic bag, and threw it over the fence. (Tr. 166, 222-23). Both officers saw Defendant throw the baggie over the fence. (Tr. 166, 168, 223). Officer Chamblin grabbed Defendant, and Officer Clark placed Defendant in handcuffs. (Tr. 169, 224). After Defendant was secured, Officer Chamblin jumped over the fence and seized the discarded plastic bag. (Tr. 169-70, 224-25). The bag contained crack cocaine. (Tr. 258).

The jury found Defendant guilty as charged. (Tr. 289). The court sentenced Defendant to sixteen years' imprisonment. (Tr. 300).

ARGUMENT

I. (exclusion of defense witness).

The trial court did not abuse its discretion in excluding Defendant's witness, Nautica Little, in that Ms. Little's proffered testimony was not relevant to the charged crimes and was not more probative than prejudicial.

A. Additional facts.

At trial, Officer Clark testified that prior to Defendant's arrest, he did not see anyone other than Defendant on the street. (Tr. 178-79, 207). Officer Clark testified that he did not recall a man sitting in a pickup truck, and he did not encounter George Ford until after he put Defendant in handcuffs and was escorting Defendant to the patrol car. (Tr. 201). Officer Clark testified that Mr. Ford approached the officers after they placed Defendant in the patrol car. (Tr. 201). Officer Clark testified that he thought Mr. Ford was a potential victim, and he asked Mr. Ford if he could search his vehicle to determine if anything had been stolen. (Tr. 201-02). Defense counsel attempted to ask Officer Clark whether Officer Clark "encounter[ed] anyone else on the street," but the prosecutor objected on relevance grounds, and the court sustained the objection. (Tr. 207). Defense counsel then attempted to ask "[W]as anybody out on the streets during this whole time?" (Tr. 208). The

prosecutor objected on the grounds that the question had been asked and answered, and the court sustained the objection. (Tr. 208-09).

After Officer Clark testified, the court recessed the case until the following day. (Tr. 210). The next morning, defense counsel informed the court that Ms. Little was outside the courtroom, and he wished to have her testify. (Tr. 210). The following exchange occurred:

> [Defense counsel]: Outside the courtroom right now is a witness. Her name is Nautica Little. Your Honor, I would anticipate that I would call her to testify, and if she did testify, Your Honor, she would – she would be able to say that she and her fiancé, George Ford, had been living on the 5700 block of Wabada, which is the house located directly behind or a little bit catty-corner from the truck that the officer pointed out and that George Ford was outside at the time when she heard a commotion.
>
> In addition she would testify that George Ford and [Defendant] know one another; that George Ford considers – well, that she says the relationship between them is stepson. She would then testify that she heard the commotion, she came outside of the residence, she saw that they had [Defendant]

handcuffed on the ground, that they were shouting about a gun or a weapon.

In addition, she pulled out her phone and began videotaping the incident. And one of the police officers seized her phone away from her and told her that she couldn't, that she couldn't videotape it.

She would be able to testify that they searched George Ford's truck and also she saw him walk across the street and search the lot across the street and they didn't find anything over there either.

The court: All right. What's your reply, Counsel?

[The State]: Your Honor, I believe her testimony to be wholly irrelevant to the point of whether the defendant possessed cocaine or not. A lot of the statements from George Ford to her would be hearsay. George Ford could have come in here and testified as to the relationship himself.

I also believe that the fact that they come out and see – she apparently comes out and sees the defendant already handcuffed after the crime was committed, so she saw nothing.

> The court: All right. The witness will not be allowed. You made a sufficient record. Your record is overruled and we will proceed.

(Tr. 210-12).

Officer Chamblin then testified that he was suspicious of Defendant because "he's the only person out; and apparently he was looking into vehicles." (Tr. 214-15). Officer Chamblin testified that he did not recall encountering Mr. Ford, although he thought that Officer Clark spoke to another person at the scene. (Tr. 228, 232). Officer Chamblin testified that he did not see anyone other than Defendant "initially," and that he "only saw [Defendant] walking on the sidewalk looking into vehicles." (Tr. 232, 236-37). Officer Chamblin testified that he never yelled at Defendant about a weapon. (Tr. 239). Defense counsel asked Officer Chamblin whether there was "another female that was outside at any point," but the prosecutor objected on relevance grounds, and the court sustained the objection. (Tr. 233).

Defendant included this claim of error in his motion for new trial. (L.F. 68-69). In his motion, Defendant argued that Ms. Little's testimony "was relevant to attack the credibility of the police officers and offer an alternate reason as to why the defendant was outside that evening (instead of engaging in car clouting, defendant was outside his friend George Ford's residence, with his friend George Ford.)" (L.F. 68). During the hearing on the motion for

new trial, Defendant reiterated his argument as to the relevance of Ms. Little's testimony. (Tr. 293-94). Defense counsel argued:

> My position still remains the same; that Ms. Little's testimony would have been relevant to attack the credibility of the police officers in two respects; one, the officers claimed that they were, that they observed [Defendant], that they observed him engaging in behavior which led them to believe that he may be breaking into cars, car clouting.
>
> What they testified to was that they believed that they saw him and that he was moving down the street, looking into car windows of cars, that this behavior was suspicious to them and that they thought he was going to commit car cloutings.
>
> They didn't mention the fact that [Defendant] was, in fact, with George Ford. This particular fact that he was engaging in this car clouting behavior, this particular fact was sort of at the beginning of the investigation is what caught the officer's attention, it's what led them to turn their police car around and to put their spotlight on [Defendant].
>
> And so Ms. Little would have testified and she would have said that George Ford was out there when [she] came out – well,

she came out later. And I understand she came out after the events, she came out later. But she would have been able to testify that she came out later and that George Ford and [Defendant] were, in fact, friends and that they were outside together.

This testimony would rebut the testimony of the police officers regarding his engaging in this behavior and challenge the credibility that he was out there by himself.

The court: Now, was this witness present in court, Counsel?

[Defense counsel]: She was present, yeah. We had her outside. And I read her statement in the record and I'd like to, at this moment – also she said she attempted to record what was happening. It was after the fact that [Defendant] was on the ground and that she was attempting to record the events, and the police threatened her and later gave her her cell phone back. Again, attacking the credibility of the police officers.

So she was here. She was available to testify. I had her outside. I made a record. I read her statement into the record. But at this point, Judge, I would like to offer as Defendant's Exhibit A, I did read it, but I want to offer it into the court file.

(Tr. 293-95).

The State argued that Ms. Little's testimony was not relevant to the charges Defendant faced. (Tr. 296). The prosecutor argued that Ms. Little's proposed statement—that Mr. Ford had been outside, she heard a commotion, and Mr. Ford came into the house and told her to go outside—would not impeach the officers' testimony about whether Defendant was with Mr. Ford because the proffered statement did not indicate that Defendant was with Mr. Ford. (Tr. 296). The trial court denied the motion for new trial. (Tr. 297).

B. Standard of review.

"The trial court is afforded broad discretion in assessing the relevance and admissibility of evidence, and its decision to admit or exclude evidence will be affirmed absent a clear abuse of discretion." *State v. Campbell*, 143 S.W.3d 695, 700 (Mo. App. W.D. 2004) (citing *State v. Mayes*, 63 S.W.3d 615, 629 (Mo. 2001)). "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances and is arbitrary and unreasonable." *Id.* (internal citation omitted). "[R]eview of the trial court's ruling is for prejudice, not mere error, and we will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *State v. Burton*, 320 S.W.3d 170, 176 (Mo. App. E.D. 2010). "Reversal is not mandated

where the strength of the overwhelming evidence of guilt overcomes the presumption of prejudice from the erroneous admission of evidence." *Id.*

C. The trial court did not abuse its discretion in excluding the defense witness.

The trial court did not abuse its discretion in excluding Ms. Little as a witness because her proffered testimony was not relevant to the charged crime. To be admissible, evidence must be both legally and logically relevant. *State v. Anderson*, 306 S.W.3d 529, 538 (Mo. 2010). "Evidence is logically relevant if it tends to make the existence of a material fact more or less probable." *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. 2002). "Legal relevance weighs the probative value of the evidence against its costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id.* Here, Ms. Little's testimony, as detailed in defense counsel's offer of proof, was neither logically nor legally relevant.

Defendant claims that "[t]here was one issue for the jury to decide in [Defendant's] trial – were two police officers lying about the events of January 25, 2012." (App. Sub. Br. 18). But the testimony of Ms. Little, as provided in defense counsel's offer of proof, would not have proven that the officers were lying. Defendant argues that Ms. Little's testimony would have directly contradicted the testimony of the two officers regarding 1) whether

Mr. Ford was on the street that night, 2) whether the officers saw Ms. Little recording them, told her to stop, and seized her phone, and 3) whether the officers yelled at Defendant about a gun. (App. Sub. Br. 15-16).

As to the testimony regarding whether Mr. Ford was outside, Ms. Little's testimony would not have contradicted the officers' testimony. Both officers testified that they did not see anyone else on the street before Defendant led them in a foot chase. (Tr. 178-79, 201, 207, 232, 236-37). Ms. Little's testimony, as described in Defendant's offer of proof, simply would have shown that Mr. Ford was outside at some point that evening near the time when she heard a "commotion." (Tr. 210-12). Her testimony would not have shown that Mr. Ford was necessarily outside before Defendant led the police on a foot chase or discarded the baggie of drugs; nor could her testimony have proven that the officers were lying about not seeing Mr. Ford, as she could not have testified where Mr. Ford was located while outside. Both her testimony and the testimony of the officers could have been true—Mr. Ford may have been outside when the officers became suspicious of Defendant, but he may have been obscured from the officers' view. Because Ms. Little was not outside at the time of the incident, she could not have testified as to Mr. Ford's location, other than the generalized testimony that

he was outdoors.[1] Her testimony thus would not have proven that the officers were lying when they said they did not see anyone else on the street at the time they encountered Defendant.

Ms. Little's proffered testimony that she went outside and was outside filming the officers after the officers arrested Defendant, and that they took her phone, would not have directly contradicted the officers' testimony. Although defense counsel attempted to ask Officer Clark whether he "encounter[ed] anyone else on the street," and whether "anybody [was] out on the streets during this whole time," these questions were met with objections from the prosecutor, and the court sustained the objections. (Tr. 207-08). Defense counsel never attempted to ask Officer Clark whether he took the phone of a woman who was attempting to record their interaction with Defendant. (Tr. 174-208). Defense counsel did not make an offer of proof as to what Officer Clark would say in response to any questioning regarding an encounter with Ms. Little; thus, it cannot be discerned whether their testimony would have been in conflict.

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[1] It is noteworthy that neither Mr. Ford nor Defendant testified at trial, so there was no testimony aside from the officers' testimony as to the events that occurred prior to Defendant's arrest. (*See* Tr. 2).

In short, there was neither testimony nor an offer of proof suggesting that Officer Clark would deny that there was an encounter with Ms. Little. Thus, Ms. Little's testimony concerning her presence outside and her encounter with the officers did not directly contradict any portion of Officer Clark's testimony, and her proffered testimony in this regard was not relevant.

The same is true for Officer Chamblin's testimony on the subject. Although defense counsel attempted to ask Officer Chamblin whether there was "another female that was outside at any point," the prosecutor objected to this question, and the court sustained the objection on relevance grounds. (Tr. 233). Defense counsel did not make an offer of proof as to how Officer Chamblin would have answered that question. (Tr. 233). The substance of Officer Chamblin's testimony on the issue of whether he encountered Ms. Little, therefore, is unknown, and, as such, Ms. Little's testimony in no way contradicted Officer Chamblin's lack of testimony on this issue.

Finally, Ms. Little's proffered testimony that "they were shouting about a gun or a weapon," (Tr. 211), also did not directly contradict the testimony of Officer Clark. Although Officer Chamblin testified that he did not yell at Defendant regarding a weapon (Tr. 239), defense counsel never asked Officer Clark whether he yelled at Defendant about a gun or a weapon. (Tr. 174-208).

As such, Ms. Little's proffered testimony that she heard shouting about a gun could have been true while not contradicting the officers' testimony—she could have heard Officer Clark yell about a gun while Officer Chamblin did not yell about a gun. Defendant did not attempt to question Officer Clark about this or to make an offer of proof on this issue once it became apparent that Ms. Little's testimony would be excluded. Because there is no evidence that Officer Clark would deny yelling about a gun, there is no reason to believe that Ms. Little's testimony would have contradicted the testimony of Officer Clark.

Further, defense counsel's recitation of Ms. Little's proffered testimony was somewhat ambiguous as to whether both officers were shouting about a gun. Defense counsel stated that Ms. Little would testify that when she came outside, "she saw that *they* had [Defendant] handcuffed on the ground, that *they* were shouting about a gun or a weapon." (Tr. 211, emphasis added). As the use of the pronoun "they" is somewhat ambiguous as to whether both officers were actually shouting, or whether Ms. Little simply attributed any act of either officer to the collective "they." A more precise offer of proof, specifying whether both officers were actually shouting, would have clarified this issue.

In short, the only portion of Ms. Little's proffered testimony that had any potential for impeachment was the portion wherein she discussed hearing shouting about a gun. To the extent that her testimony regarding whether Officer Chamblin shouted at Defendant about a gun contradicted Officer Chamblin's testimony, this contradiction could have shown one of two things: 1) that Officer Chamblin did yell about a gun but for some reason he decided to withhold that testimony, or 2) that Officer Chamblin had no memory of shouting about a gun, and testified accordingly.

Defendant argues that the contradiction demonstrates the former—that Officer Chamblin shouted about a gun, and then lied about it in court. But there is no apparent basis in the record for Officer Chamblin to have lied about this issue. This is not a case where the officers stood to gain anything from lying about the presence of a gun—this was not a case where the crime was in any way related to the possession of a firearm; nor was this a case where the police claimed the defendant possessed a firearm as a justification for using some level of force against the defendant. Rather, Officer Chamblin testified that he did *not* shout about a gun. As such, Ms. Little's testimony would seemingly only impeach that of Officer Chamblin to the extent that it called into question his ability to recall with precision all of the facts of the

night. Impeachment on this point would have had only minimally probative value.

This evidence was only minimally probative in that it would have only served to minimally impeach Officer Chamblin as to one fact. Ms. Little's testimony would have contradicted only Officer Chamblin's testimony that he did not shout at Defendant about a gun; her proffered testimony would not have contradicted Officer Chamblin's testimony in any other respect, and it would not have contradicted Officer Clark's testimony at all. As such, her testimony tending to contradict Officer Chamblin's testimony as to a collateral issue had only minimal probative value. The trial court did not abuse its discretion in excluding evidence of such minimally probative value.

Defendant claims that Ms. Little's testimony was relevant to the charged crime in that her proffered testimony showed that Defendant was on the ground in handcuffs, she saw the officers yelling about a gun, and she saw Mr. Ford come in from outside. (App. Sub. Br. 19). Defendant then states that the officers "denied seeing any gun, or taking [Defendant] to the ground," and that they "stated the street was empty during their interaction with" Defendant. (App. Sub. Br. 20).

But as to the gun, the mere fact that the officers arrested Defendant, took him to the ground, and potentially yelled about a gun does not mean

that they saw a gun. The alleged shouting about a gun could have been a routine check to determine whether the detained suspect had a weapon. Ms. Little's proffered testimony that "they" yelled about a gun and the officers' testimony indicating that they did not see a gun could both be true; Officer Clark could have yelled about a gun to check to see if Defendant had a gun without ever actually seeing Defendant with a gun. Ms. Little's testimony that the officers were shouting about a gun in no way contradicted testimony indicating that the officers did not see a gun.

Additionally, contrary to Defendant's argument, Officer Chamblin testified that the officers took Defendant to the ground[2] (Tr. 224, 231)—they did not deny that—and the officers both clarified that they did not see anyone else on the street before arresting Defendant (Tr. 178-79, 201, 207, 232, 236-37). Defendant's claim that Ms. Little's testimony contradicted the officers' testimony as to these issues is incorrect.

Defendant argues that "[c]ertain types of evidence have historically been found to be directly relevant to the case," including "evidence that

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[2] Officer Clark testified that they detained Defendant; Officer Clark never offered any testimony indicating that the officers did not take Defendant to the ground. (Tr. 169, 159-209).

included direct observation of the crime and surrounding circumstances, evidence of bias or motive to lie on the part of a witness, [and] evidence of unrelated specific acts of dishonesty where credibility is at issue." (App. Sub. Br. 19). But, as stated above, the contested evidence of Ms. Little was not that of direct observation of the crime; and to the extent her testimony tended to contradict Officer Chamblin's as to a single fact, it had minimal probative value. Additionally, Defendant does not clarify how Ms. Little's proffered testimony would expose any form of bias or motive to lie on the part of the officers as there was no indication that Ms. Little witnessed the officers engaged in any illegal or improper behavior. As such, Defendant's reliance on the cases cited for those propositions is misplaced.

Defendant relies on *Mitchell v. Kardesch*, 313 S.W.3d 667, 676-77 (Mo. 2010) and *State v. Long*, 140 S.W.3d 27, 30 (Mo. 2004), to argue that the court erred in excluding Ms. Little's testimony. (App. Sub. Br. 22). But those cases dealt with the separate question of whether a witness could be impeached with an entirely unrelated act of dishonesty. *Mitchell*, 313 S.W.3d at 379; *Long*, 140 S.W.3d at 30. The excluded evidence in this case was not evidence of wholly unrelated acts of dishonesty, and, as such, Defendant's reliance thereon is misplaced.

Defendant cites to the portion of Ms. Little's proffered testimony wherein she claimed that the "Police responded to [her attempt to film the police] by approaching Ms. Little, demanding she stop filming, and took her phone." (App. Sub. Br. 20). Defendant then suggests that the officers were attempting to destroy evidence, citing the fact that "Missouri Courts have long ruled that attempting to destroy evidence, or other evasive behavior is relevant evidence of consciousness of guilt." (App. Sub. Br. 20). But there are significant problems with suggesting that the officers took Ms. Little's phone to destroy evidence.

First, Ms. Little's proffered testimony contains no indication that Ms. Little witnessed any crime—Ms. Little's proffered testimony did not state that she witnessed the officers plant drugs on Defendant, or commit any other misdeed. (Tr. 210-12). As such, there is no indication that the officers were engaged in a crime or misdeed at the time Ms. Little allegedly filmed them, and her testimony related to her alleged encounter with police would not indicate in any way that the police framed Defendant. Additionally, defense counsel at no time attempted to offer Ms. Little's phone into evidence, or to make an offer of proof to attempt to show that Ms. Little filmed a portion of the officers' encounter with Defendant, that they took her phone, or that they erased any recording Ms. Little allegedly made. As such, any claim

that the phone contained evidence of the officers committing crimes is wholly unsupported by the record. Finally, the record shows that the officers returned Ms. Little's phone, and there was never any suggestion, let alone an offer of proof, suggesting that the officers destroyed or erased anything on the phone.

The trial court did not abuse its discretion in excluding Ms. Little's testimony in that it was not relevant and had only minimal probative value. Defendant's point should be denied.

II. (sentencing).

The trial court did not plainly err in telling Defendant prior to the sentencing hearing the sentence it was leaning toward because the trial court's statement did not preclude mitigating evidence, and the court properly made its decision based on the evidence from trial and the sentencing assessment report after providing Defendant an opportunity for allocution and hearing defense counsel's argument.

Defendant argues that the trial court plainly erred when it "announced that it had decided on a sentence before any evidence was given at the sentencing hearing, and made it clear that the evidence at the sentencing hearing would and could not change the sentence that was decided on before [Defendant] even entered the courtroom that day for sentencing." (App. Sub. Br. 25). But the trial court simply told Defendant the sentence it was leaning toward, and the trial court followed the required sentencing procedures set forth in Supreme Court Rule 29.07. The trial court, therefore, did not plainly err in sentencing Defendant.

A. Additional facts.

At the sentencing hearing, defense counsel argued that Defendant should receive a thirteen-year sentence. (Tr. 298-99). The State then argued that Defendant should receive a seventeen-year sentence. (Tr. 298). The court

initially noted that it received a letter from a reverend on Defendant's behalf and that the court had read that letter. (Tr. 299). The following exchange occurred:

> [The court]: All right. I'm sure [defense counsel] explained to you kind of how I operate, and you already know what sentence you are going to get even before I pronounce it. You already know that, don't you?
>
> The Defendant: No, sir.
>
> The court: [Defendant], you've been around too long from [sic] that. I expect that from my juveniles. I never sentence a defendant without telling the lawyer what I'm going to do beforehand, and I tell the lawyer to always come and tell you so you sit in that box all morning and you know exactly what sentence I'm going to give you because he told you, didn't he? Didn't he tell you?
>
> The Defendant: He told me what you was leaning towards. He didn't say –
>
> The court: All right. So he already told you what I was going to do and so that's – so it's not a surprise when I sentence you. I just, you know, most people that come in here, they think that the

defendant is surprised about the sentence, but the defendants are never surprised because I always tell you beforehand. Is there anything you want to state?

The Defendant: No, sir.

(Tr. 299-300). The court then sentenced Defendant to sixteen years' imprisonment. (Tr. 300).

B. Standard of review.

Defendant asks this court to review for plain error. (App. Br. 27). An appellate court has the discretionary authority to review for plain error affecting a defendant's substantial rights "when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20; *State v. Carney*, 195 S.W.3d 567, 570 (Mo. App. S.D. 2006). Plain error review is utilized sparingly, and a defendant seeking such review bears the burden of showing that plain error has occurred. *See State v. Garth*, 352 S.W.3d 644, 652 (Mo. App. E.D. 2011); *State v. Lloyd*, 205 S.W.3d 893, 906-07 (Mo. App. S.D. 2006).

"Review for plain error involves a two-step process." *State v. Baumruk*, 280 S.W.3d 600, 607-08 (Mo. 2009). "The first step requires a determination of whether the claim of error "facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted.'" *Id.*

(quoting *State v. Brown*, 902 S.W.2d 278, 284 (Mo. 1995) (internal citation omitted)). "All prejudicial error, however, is not plain error, and '[p]lain errors are those which are evident, obvious, and clear.'" *Id.* (quoting *State v. Scurlock*, 998 S.W.2d 578, 586 (Mo. App. W.D. 1999) (internal citation omitted)). "If plain error is found, the court then must proceed to the second step and determine 'whether the claimed error resulted in manifest injustice or a miscarriage of justice.'" *Id.* (quoting *Scurlock*, 998 S.W.2d at 586).

C. The trial court did not plainly err.

The trial court did not plainly err in giving Defendant the courtesy of telling him prior to the sentencing hearing the sentence it was leaning toward. The trial court made this determination after hearing all of the evidence at trial and reviewing the sentencing assessment report. As such, the trial court did not engage in prejudging by telling Defendant his likely sentence prior to hearing mitigating evidence. The trial court merely gave Defendant the courtesy of telling defense counsel in advance the sentence it was leaning toward; the court did not preclude mitigating evidence or refuse to hear defense counsel's argument. As such, Defendant was free to present mitigating evidence, which could have changed the trial court's sentence determination. The trial court did not, as Defendant suggests, state that it would not be swayed by any mitigation evidence. (Tr. 299-300).

Further, trial judges are presumed to know and follow the law. *State v. Poole*, 216 S.W.3d 271, 277 (Mo. App. S.D. 2007). Rule 29.07 sets forth the procedures required for sentencing. The rule states:

> Sentence shall be imposed without unreasonable delay. When the defendant appears for judgment and sentence, he must be informed by the court of the verdict or finding and asked whether he has any legal cause to show why judgment and sentence should not be pronounced against him; and if no sufficient cause be shown, the court shall render the proper judgment and pronounce sentence thereon.

Rule 29.07. The court followed this procedure. The court gave Defendant an opportunity for allocution and heard defense counsel's argument concerning sentence. The court also indicated that it considered the letter from the reverend as mitigation evidence. (Tr. 299). As such, the court followed the law and did nothing improper in giving Defendant the courtesy of telling him the sentence it was leaning toward so that Defendant would not be surprised at the sentencing hearing.

The trial court did not err in giving Defendant the courtesy of preventing undue surprise at sentencing by telling him beforehand the sentence it was leaning toward. As the trial court determined this sentence

after hearing the evidence at trial, considering the sentencing assessment report, considering the reverend's mitigation evidence, and hearing defense counsel's argument, no manifest injustice or miscarriage of justice occurred. Defendant was properly sentenced, and his point should be denied.

CONCLUSION

The trial court did not commit reversible error. Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Jennifer A. Rodewald
JENNIFER A. RODEWALD
Assistant Attorney General
Missouri Bar No. 64236

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-1626
Fax: (573) 751-5391
Jennifer.Rodewald@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,405 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this filing was sent through the eFiling system on this 26th day of January, 2015, to:

Amy Lowe
1010 Market Street
Suite 1100
St. Louis, Missouri 63101

/s/ Jennifer A. Rodewald
JENNIFER A. RODEWALD
Assistant Attorney General
Missouri Bar No. 64236
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-1626
Fax (573) 751-5391
Jennifer.Rodewald@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI